MICHIGAN SUPREME COURT

PUBLIC HEARING
SEPTEMBER 28, 2011

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CHIEF JUSTICE YOUNG: Good morning and welcome the first public hearing of our term. We have a number of matters before us this morning upon which members of the public wish to make comment. And we will begin with the first which is administrative item 2010-7. It's the amendment – the proposed amendment of MRPC 1.5. We have three speakers—Ms. Bullington, Mr. McLellan, and Mr. Christensen. Ms. Bullington. The – you're allotted three minutes.

ITEM 1: 2010-07 – Proposed Amendment of Rule 1.5 of the Michigan Rules of Professional Conduct

MS. BULLINGTON: Thank you. For both 1.5 and (inaudible) the other group of rules –

CHIEF JUSTICE YOUNG: Just the 1.5.

MS. BULLINGTON: With –

CHIEF JUSTICE YOUNG: So you get two cracks apparently.

MS. BULLINGTON: Pardon me?

CHIEF JUSTICE YOUNG: You get another opportunity apparently.

MS. BULLINGTON: Excellent. With respect to 1.5 it is recommended that at least in its present form the proposed rule not be adopted. It does not appear well drafted. I think that under the present form of the proposed rule an attorney could argue that the fee could be an additional 25% on top of the one-third fee making a total fee of 55% chargeable to the client. I think that's an unintended consequence of the rule language as proposed.

In addition to which – rather than have the client agree to the referral fee, it is simply recommended that the rule simply constitute a requirement that the lawyer provide –

CHIEF JUSTICE YOUNG: Excuse me. Would all of you who have phones cut them off.

JUSTICE ZAHRA: It was my computer.

CHIEF JUSTICE YOUNG: Well, then you have to have to leave. All right, sorry.

MS. BULLINGTON: That's quite alright.

CHIEF JUSTICE YOUNG: Would all of you who have phones please cut them off anyway. Okay.

MS. BULLINGTON: provide notice to the client of their opportunity to object to the referral fee confirmed in a writing. Currently – the current rule, 1.5, dealing with the referral fee is that the client knows of and does not object to the referral fee – I think that the better course of action would be that the lawyer provide written notice to the client of the anticipated referral fee.

CHIEF JUSTICE YOUNG: Let me – I'm not sure I follow your last set of comments because under the change proposed in subsection (c), which deals with the contingent fee and what must be in writing and disclosed, the amendment says the agreement shall also state that the amount or percentage of fees to be divided or shared among or between lawyers who are not in the same firm. And then in section E(1) it says the client – if there are fees between lawyers that are not in the same firm, the client is advised of it and does not object to the participation of all lawyers involved. And the amendment says and approves the amount or percentage of fees to be divided or shared among the lawyers. Doesn't that address the very issue you just spoken to?

MS. BULLINGTON: It does address the issue, but it adds on another hurdle to the referral fee situation, i.e., that the client must give explicit approval. The current rule does require notice to the client and it states that where the client does not object.

CHIEF JUSTICE YOUNG: What is it that you're asking? Do you want the client – you want the client informed, one.

MS. BULLINGTON: We simply want the client informed in a writing of their opportunity to object to a – the referral fee itself.

CHIEF JUSTICE YOUNG: Oh, you're talking about the – yes, I don't understand then what you're objections are to the two changes that I just referenced.

MS. BULLINGTON: The first – only that to the extent that it adds on a procedural burden on the lawyer in terms of referring cases out. The Commission does believe that referring cases out between attorneys is a benefit overall to the client because it does bring on - attorneys on board who have more expertise.

CHIEF JUSTICE YOUNG: And you want that to be in writing, right?

MS. BULLINGTON: And we want that to be in writing.

CHIEF JUSTICE YOUNG: That's what it says – the contingency fee agreement shall state a percentage of fees to be divided or shared. That – that's gotta be in writing.

MS. BULLINGTON: That has to be in writing.

CHIEF JUSTICE YOUNG: But you object to that as an additional burden.

MS. BULLINGTON: No, that the next portion going on saying that the client approves that referral fee. That changes the rule from the current status of the rule which is does not object to the referral fees. And –

CHIEF JUSTICE YOUNG: And why do you think that it's an abomination or a crime against nature that the client actually object to fee arrangements that the – his lawyer or her lawyer are entering into on his behalf?

MS. BULLINGTON: It's not horrible, it's not an abomination. It's simply more technical in nature. If you had that in there it wouldn't be horrible, but I think that you know to some extent it's just adding on another layer on the attorney's shoulders that isn't really necessary. In the quarter of a century that we've had the referral rule in affect, there's only two instances that I can recall in which an attorney – in which a client has actually complained to our office about a referral fee situation.

CHIEF JUSTICE YOUNG: Thank you.

MS. BULLINGTON: Thank you.

CHIEF JUSTICE YOUNG: Any other questions? Mr. McLellan.

MR. McLELLAN: Mr. Chief Justice and members of the Court. My name is Richard McLellan and I'm an attorney in Lansing. I'm not a trial attorney. My experience is largely in the area of public policy and legislation. I'm here to oppose the proposed amendment to Rule 1.5. And I have three – since I have three minutes I have three bases on which I want to make that argument. First, the danger of government price setting. Secondly, no identified problem requiring government intervention. And, third, the values to society of the freedom to contract.

This is a unique sort of proceeding. We have this Court deciding whether to set prices on a service in our society. In the political branches, government price controls proposals have generally been rejected unless there's a case of natural monopolies or other limited circumstances. So it's unusual that the – in our particular economy that the government steps in to set prices. You're considering whether to adopt a government imposed price limits on a service that is highly competitive among licensed members of the Bar, and I think you should be very careful before you go down that track. But particularly because there's no identified problem that I – I have read all the letters. Now granted most of them are from trial lawyers, but you're acting in a quasi-legislative role here to set policy. You have the inherent powers to set prices on inter-lawyer agreements, but I think there are a lot of reasons why you should not. There simply has been no study, survey, analysis, which I'm aware of, which presented – which supports this kind of price controls imposed by the Michigan Supreme Court, nor any particularly good argument that I've seen that it's in the public interest.

And, thirdly, and perhaps most important from my personal perspective, there's a great value in the freedom to contract – it's in the public interest. In general, contracts when entered into freely and voluntarily are enforced by the courts. The freedom to contract is a fundamental aspect of our free society. You have the power to regulate both the practice of law and the business of law, but I don't think that is sufficient reason for you to decide to step into the business of law and begin regulating inter-lawyer agreements. I think that anytime the government steps in to regulate prices there are unintended

consequences. And I think that this is an example, and several of the arguments that have been put forth suggest some of the consequences that are not particularly in the public interest. There is a value in referral to better lawyers. There is a value in some of these referral fees.

I don't think lawyers should be expected to act against their legitimate professional and financial interests. It's in the public interest that the referral relationship between attorneys and/or firms should appropriately reflect the skill, reputation, and experience of the parties. I think this proposal picks an arbitrary number, has no real rationale that I can determine, and I also, not being a trial lawyer, I – I always worry. It's the trial lawyers today; it could be the rest of us next year. So for that reason I oppose the rule.

CHIEF JUSTICE YOUNG: May I ask you - on the same rationale do you propose - the ABA's model rule has a proportionality provision –

MR. McLELLAN: Excuse me (inaudible)?

CHIEF JUSTICE YOUNG: I'm sorry. The ABA model rule has a proportionality requirement that the referral fee reflect the actually participation of the respective lawyers. So I take it from the rationale you've just advanced you would also oppose the ABA's proportionality requirement.

MR. McLELLAN: I think I would, yes.

CHIEF JUSTICE YOUNG: Let me ask the question I asked of the prior speaker. You have been speaking about the referral fee arrangements, do you have an objection to informing the client of the relationships that are reflected in the referral agreement and requiring the client to approve or acquiesce?

MR. McLELLAN: Justice Young, I have more of a practical concern about that. I don't think it makes a difference. Many, many businesses are regulated and they can deal with layer after layer of different regulations. This basically, I think, provides some more burdens that the previous speaker mentioned. I don't think –

CHIEF JUSTICE YOUNG: Really – whose interest –

MR. McLELLAN: The most important –

CHIEF JUSTICE YOUNG: whose interest are we protecting here? Whose interest are we trying to protect?

MR. McLELLAN: Well, I think you have the public interest, you have the client interest in a particular case. But in terms of inter-lawyer referrals, I think that the client interest is in making sure he or she gets the best lawyer for that particular case. But I'm not – I'm not gonna say that the client ought to know if he or she cares what the business arrangement is. But, in general, I would not support the state – the amount or percentage of fees to be divided or shared partly because as I've looked into it –

CHIEF JUSTICE YOUNG: Yeah, but I'm not – I'm not asking you about that.

MR. McLELLAN: Okay.

CHIEF JUSTICE YOUNG: I'm asking about disclosure and potential acquiescence or acceptance provisions that have to do with whatever the deal is that the client has to be advised of it and they accept or acquiesce on it.

MR. McLELLAN: No. Chief Justice Young when I have cases I don't always go to the client on every sort of business decision that you make when you're trying to administer the case. You generally – if they want to know you'll do it. I think that this is probably – as I said, I think it will add more paperwork, more concern among clients without the particular benefit.

CHIEF JUSTICE YOUNG: Thank you.

MR. McLELLAN: Not that there wouldn't be some benefit.

CHIEF JUSTICE YOUNG: Any other questions?

MR. McLELLAN: Thank you.

MR. CHRISTENSEN: Chief Justice, the Court, I'm – my name is David Christensen. I'm speaking today on behalf of the Negligence Section of the State Bar of Michigan. I too – I think I have three points – because the other speakers have three points – I could add more. I think to follow up with your question previously posed I think the division – announcing the division of fees in a contingent fee agreement at the beginning of the relationship poses a couple of problems. And to my mind

it doesn't serve any interests, particularly the client's interest. The first practical problem is there are many relationships and many cases that get referred over where the referring attorney has started out working on a case and done a significant amount of work finds him or herself in over their head or too busy or whatever and refers the case out. Those cases are sometimes – and depending on the size of the case, maybe it's very iffy on liability, it could be big it could be zero. Many times those fee – referral fee arrangements are negotiated at the end of the case to everybody's satisfaction, but you don't know what it's going to be. You may have an idea of a range going in, but you don't know what it's going to be when you accept that new case. But because of your relationship with that referral source over the years, it's a trusting and good relationship and works out. You can't put that in a contingent fee agreement at the beginning.

The second announcing that referral fees or that split while it's important I think that the client know there is a referral fee being paid, it doesn't serve them any interest at all. It doesn't better their protections or weaken their protections to tell them what that business relationship breaks down to. It's invisible to them. It doesn't increase their cost or reduce their cost. This rule I think is a threat to the public and a threat to clients in another way though because it is certain, in my mind as somebody who's been doing this a long time, to reduce referrals and encourage attorneys who are not specialists or not as experienced to keep cases that could be better served in other people's hands. And, for example, and this was spelled out in one of the comments I think, Tom Waun, you know quite skilled. For example, if there's a case that everybody can see is worth a million dollars in any lawyer's hands, that lawyer would generate a fee of $333,000. If that lawyer referred it out to a specialist, maybe that's a divorce lawyer or something, referred it out to a specialist in malpractice maybe it's worth two million dollars. The client gets a lot more money. Under the 25% referral fee, the referring lawyer would only get $166,000 whereas if he or she kept it they would get twice that, but the client would double. In other words, it would be a two million dollar case, but if the inexperienced lawyer kept it that lawyer would get a larger fee than if they referred it out to the great benefit of the client. So that's a practical example that I think would occur – I say with assurance. I think this rule as we've seen in the comments presented to the Court would tend to hurt particularly smaller firms, sole practitioners, out state and up north law

firms as we've heard who rely upon widespread referral networks because they're so few.

CHIEF JUSTICE YOUNG: You should conclude your remarks.

MR. CHRISTENSEN: Yes. And I would want to follow up on John Jacobs comment. As drafted, it would generate unintended consequences of awarding a 25% referral fee of the total amount recovered which is not what anybody intended I believe.

JUSTICE MARKMAN: Mr. Christensen I've been listening – I missed what you said if you said anything at all concerning the provision that would basically put the burden on the client to approve the referral and the allocation of fees. Do you have any objection to that?

MR. CHRISTENSEN: I – if it's done at the end of the case, I don't really have an objection to that. I'm not sure what – they know they're being referred over at the beginning of the case. But because of the difficulty in many cases of ascertaining what the breakdown is, what the actual –

JUSTICE MARKMAN: No, but what about the referral itself? I mean what if somebody's had a bad experience say with lawyer A and doesn't want to be referred to lawyer A, should that individual have the opportunity to veto that referral?

MR. CHRISTENSEN: Absolutely, and they do, yeah. The referrals happen - in our experiences a referring lawyer refers that person to us and then they come over to our office and meet with them and we initiate a relationship and a contingent fee. It's – they come to us.

CHIEF JUSTICE YOUNG: Is it fair to say that given that the contingency fee arena sort of as to the client carves out a third which is not the client's to enjoy. The division of that between lawyers is really not a client interest that they need to –

MR. CHRISTENSEN: Correct.

CHIEF JUSTICE YOUNG: assess.

MR. CHRISTENSEN: Right. That's revenue to the law firm and how we spend that – whether it's spent on a referral fee or on Xerox or on a secretary, it's a business expense that is invisible to the client.

CHIEF JUSTICE YOUNG: Thank you. Any other questions?

MR. CHRISTENSEN: Thank you.

CHIEF JUSTICE YOUNG: Thank you. I think those are all the speakers we have on Item 1. So we'll move on to Item 2 which is ADM 2010-11 – Proposed Amendment of Rule 2.511 – whether to adopt – to clarify procedures on disqualification of jurors. I see there are no persons signed up to discuss that. So we'll move on to Item 3 which is the proposed amendment of Rule 3.707 and it's 2010-17 – that's whether to adopt an amendment to MCR 3.707 clarifying when one may bring a motion to modify or terminate a PPO. And there are no members of the public subscribed to speak to that. So we will move on to Item 4 which is ADM 2010-36 regarding the retention of the amendment of Rule - MCR 3.705 which was adopted and given immediate effect to conform to legislation. At this point, no one has signed up to address that item. So we will move on to Item 5 which is ADM 2011-04 – Proposed Amendment of Rules 3.911 and 3.915 concerning the time frames within which to make a jury demand and certain other matters concerning juvenile protective proceedings. And there are no people subscribed to speak to that. Moving now to Item 6 – 2010 – I'm sorry – 2011-05 – Proposed amendments to a scad of the Rules of Professional Conduct. We have four people subscribed – Ms. Bullington, Mr. Schied, Ms. Borghese, and Mr. Allen. You can come up.

ITEM 6: 2011-05 - Proposed Amendments to Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9. 1.13, 1.14, 1.15, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2, and 8.4 of the Michigan Rules of Professional Conduct

MS. BULLINGTON: Thank you.

CHIEF JUSTICE YOUNG: Still make your appearance.

MS. BULLINGTON: Cynthia Bullington appearing on behalf of the Grievance Administrator and the Attorney Grievance Commission. I preface my comments with the suggestion simply that the rule – proposed rule changes to the Rules of Professional Conduct be tabled until the ABA completes its Ethics 2020 survey of the rules. They are considering significant changes to the ABA Model Rules as well as paying particular attention to the technological aspects of the rules. Having said that for the most part I would rely upon my written submission. I would like to highlight that one particular rule

that I do not – well there are two rules that, in particular, I do not believe should be adopted. In particular is under 5.2 when lawyers are involved in a supervisor/subordinate relationship the supervisor may assume responsibility for making the judgment. That language I believe would insulate the junior lawyer from his or her own ethical responsibility in considering an application of the Rules of Professional Conduct to their own situation. My next recommendation against adoption is under MRPC 8.4(b) – a lawyer who holds public office assumes legal responsibilities beyond those of nonlawyer citizens. I think that that language is so aspirational I mean it's good language to aspire to, but in terms of disciplinary enforcement I'm not quite sure how my office would actually enforce it or what conduct would violate that aspirational language.

CHIEF JUSTICE YOUNG: It seems to me this exercise which is essentially pulling from the commentary things that seem directive and putting them in the rule themselves has exposed, if nothing else, how much nefarious mischief there is in the commentary. Wouldn't you agree?

MS. BULLINGTON: I would –

CHIEF JUSTICE YOUNG: For example, the very first provision that you objected to that a supervising lawyer assumes responsibility for the ethical consequences of a course of action relieving a junior member of that same team of the ethical responsibility, that's – that's what the commentary says, isn't it?

MS. BULLINGTON: I agree that there is a large room left in the commentary for problems to crop up. Of course, the commentary is not binding if you put it into the rule section it does become binding.

CHIEF JUSTICE YOUNG: What do you think the office of the commentary is?

MS. BULLINGTON: It is to provide guidelines and, of course, even under the ABA Model Rules there is language to the effect that if you follow the commentary along and – then you will - the (inaudible) to have avoided a violation of the bright line language. So –

CHIEF JUSTICE YOUNG: Well, so the junior attorney that says gee, I don't that's right, looking at the commentary can be

assured that he or she has not violated the canons if he takes a bunk on asserting the ethical position.

MS. BULLINGTON: It – I think it is problematic, and I think that that's –

CHIEF JUSTICE YOUNG: Well, perhaps your – your Commission will look at those commentaries since you're proposing that we do nothing. Maybe you might want to look seriously at the commentary that you claim give guidance to how to apply the (inaudible) set of rules.

MS. BULLINGTON: The commentary as adopted I'm pretty sure was not drafted by my office –

CHIEF JUSTICE YOUNG: I didn't say it was, but you have now identified problems that confound the application of the rule. I thought maybe that might be something your Commission might be especially interested in avoiding.

MS. BULLINGTON: I am sure that it would be very interested in avoiding particularly since we do put the burden on the shoulders of a subordinate attorney to arrive independently at their own ethical decision. And, of course, any language in the commentary that contradicts that separate responsibility would tend to confuse I think any lawyer. And I do think it's not fair.

CHIEF JUSTICE YOUNG: Thank you.

MS. BULLINGTON: Thank you.

MR. SCHIED: Good morning. I'm David Schied and I'm here today to address agenda item 2011-05 in regards to attorney ethics. I wish the Supreme Court, the Judicial Tenure Commission, and the Attorney Grievance Commission to address what I have to say relative to that agenda item. Specifically, I question the means by which attorney and judicial self-policing do anything except enhance the current condition of runaway corruption of the entire Michigan judicial system from top to bottom. The evidence of my assertion is based upon my first person experiences that are publicly posted on a website at Michigan.constitutionalgov.us/cases/DavidShiedQW. My case was before the Michigan Supreme Court in David Shied v Sandra Harrison, the Lincoln Consolidated School District, in 2006. In 2009, I filed a second case with your Supreme Court bench; it was distinctly a quo warranto state ex rel case. However, the

Court blatantly mischaracterized that new case as being one and the same as a third racketeering and corruption case I had brought against the state in 2007. Both of those latter two cases named numerous judges, attorneys, and assistant attorney generals for state and federal violations of due process, full faith and credit, and other constitutional violations. The quo warranto case was filed after the Court of Appeals judges Owens, Donofrio, and Bandstra used color of law to deprive me of my constitutional right to criminal protection as an alleged crime victim despite my having filed sworn a criminal complaint constituting indictments by definition. Their dismissing my numerous motions without address of the facts in evidence followed Judge William Colette's lower court dismissal in Ingham County without hearing on any of the numerous motions I had paid money to have his court to have litigated. Unethically, the Court of Appeals judges failed to address government racketeering and corruption with anything besides gross admissions and misstatements when constructing their opinions. They also refused to litigate the merits of my demand for criminal grand jury investigation which this Supreme Court also completely disregarded. The documents posted on the website include my 2009 letter to Clerk Davis protesting his misrepresentation of my quo warranto state ex rel case as an entirely different case as a matter of official record. The Supreme Court ruling only compounded this fraud upon the public about the nature of the case that was actually before them. All this occurred just months prior to Justice Weaver announcing her retirement and blowing the whistle in a press conference while essentially asserting that the Michigan judicial system is thoroughly corrupt. The bottom line – there is no reason to modify the rules of attorney ethics. The rules are routinely ignored and the Attorney Grievance and Judicial Tenure Commission blindfold themselves to overt and covert lawlessness in Michigan courts regularly violating both rule of law and constitutional rights. Mayhem in Michigan courts is business as usual. Secrecy is the badge of fraud. The FOIA exemption for Michigan's judiciary supports this secrecy. When nobody enforces the rules and laws, everyone blindfolds themselves to the colorful elephant in the room. What's the name of the elephant - government corruption and immunity to crimes.

CHIEF JUSTICE YOUNG: Thank you.

MR. SCHIED: Thank you. I have a copy of something here I'd like to –

CHIEF JUSTICE YOUNG: Give it the Crier. Is Ms. Borghese here? Okay. Good morning.

MS. BORGHESE: Good morning. I'm Sally Borghese and I'm from Kent County. And I'd like to thank you for the opportunity to speak before you. I just have a brief statement, but I think you had me in the wrong pew here because I want to make a statement on Rule 3.911 and 3.915.

CHIEF JUSTICE YOUNG: Let's see – which were those. I don't have them – juvenile? Oh, okay.

MS. BORGHESE: Okay.

CHIEF JUSTICE YOUNG: You can speak to that.

MS. BORGHESE: So I'll just read it to you. In child protective service cases when attorneys are appointed and meet their clients five minutes before going into court and sometimes not at all before going into court as in the case of my daughter, the defendant has no understanding of what is about to take place. How is it possible for an attorney to represent someone they have never met? It is usually at this juncture in the case that a jury should have been requested. However, the defendant has no inclination that this should have been done. It is also not common practice for court appointed attorneys to suggest a jury in child protective cases, and by the time the defendant on their own initiative remembers that it is available and asks their attorney to request a jury, time to do so has expired. Therefore, due process is not served. In Rule 3.915, it is stated that a guardian ad litem is required to visit a child prior to each hearing. Again, in my daughter's case and my granddaughter's case, the guardian ad litem never visited the child. The statute was just ignored and not addressed as required. When a defendant in child protective cases has elimination of some due process, other lawful requirements may go by the wayside. In my daughter's case, it was subject matter jurisdiction. Cases move quickly through the court, and many due process issues are just assumed or taken for granted. Hence, the defendant must rely on an appeal to the Court of Appeals on the lower court decisions. So if juries were the norm in child protective adjudication, many cases might be eliminated at the onset due to the fact that more law and court rules would be used. Thank you.

CHIEF JUSTICE YOUNG: Thank you. Any questions? Thank you very much.

MS. BORGHESE: Okay.

CHIEF JUSTICE YOUNG: Mr. Allen.

MR. ALLEN: Mr. Chief Justice, honorable Justices of the Court. Good morning. My name is John Allen, I'm a Michigan lawyer. I'm a partner with Varnum attorneys. You have my comments in your file, and I certainly am not here to repeat those to you today. I also though want to take just a second and thank all the other folks who took time out of their busy days to be here and the folks who submitted comments to you.

I make a couple of generalizations and observations. I personally sense in these proposals the same longing – the hole in my professional heart that I have felt ever since the ethical considerations of the former code were done away with when we replaced them with the Rules of Professional Conduct now a quarter a century or so ago. But I also agree completely with the findings of the Kutak Commission of the ABA back in the late '70s early '80s, led I might add in large part by our own Michael Franck who concluded that those ethical considerations had become tools of abuse in both the disciplinary process and the civil litigation process by imposing principles and standards upon lawyers which were never intended to be principles and standards as ramps for that liability or that discipline. It is for that reason that I come to ask you to carefully reconsider the concept of elevating the imprecise and generalized language of the comments or commentary as they're sometimes called into the body of the rules themselves. And I do that for two reasons. First, this Court has often correctly observed that in a disciplinary context the rules are a strict liability set of potential sanctions for a lawyer in a quasi-criminal context. I mean ultimately I can lose my license to practice law for violating those rules. And in the culpability stage of that determination there is no room for the concepts that we might refer to as contributory negligence or due care or any of those. Those enter in at the sanction phase, but they don't really have anything to do with finding culpability. Secondly, and I think even more importantly from my point of view as a private practitioner, these rules are now used as ramps for civil liability. Most of your 40,000 lawyers in Michigan are far more likely to encounter these rules in a civil context as part of a fee dispute or a malpractice claim than they are to see them before the Attorney Grievance Commission or the ADB. Finally, let me relate to you one personal experience from this morning that reflects on your proposal for 1.5

regarding fees which says a lawyer shall not perform the lawyer's duty using inefficient or wasteful procedures in order to exploit a fee arrangement. Obviously, a fine general principle, but very difficult to apply in a disciplinary context. This morning I came up here using the same route from Kalamazoo I've used hundreds of times over the last 40 years across 94 up 69 intending to come over 496 and here to the Court building. However, when I got to Lansing Road I-69 North was closed apparently due to some accident or incident that had occurred. If this were a fee producing engagement, and I emphasize it is not, but if it were for me today and if there were a client set to pay that fee, could they use this rule to come in and say you really should have done more to research that route. You should have tracked what was going on. Maybe it would have been better for you to go up 131 to Grand Rapids and then over 96. But as it turns out, your charges here are excessive under those circumstances. Is that reasonable, I think probably not –

CHIEF JUSTICE YOUNG: Please conclude your remarks.

MR. ALLEN: Is it a basis for a possible claim, I worry about that. And I worry the same thing about much of the language that's in the rest of the rules. Thank you for your good work on this. We appreciate your great attention to the rules, and we know you regard them just as seriously as all the practitioners that are here doing law under your jurisdiction. Thank you very much.

CHIEF JUSTICE YOUNG: Any questions? Thank you very much. That concludes the public administrative hearing. We have one additional matter for disposition which is item – ADM 2010-18 which concerns a proposal to amend the professional canons regarding pro bono work – it's MRPC 6.1. We have a core proposal that was offered by the Court's twins – Justices Kellys – to which there are – at least as far as I'm aware two –

JUSTICE MARILYN KELLY: I think perhaps we can do away with that humor, thank you.

ITEM 7: 2010-18 – Proposed Amendments of Rule 6.1 of the Michigan Rules of Professional Conduct

CHIEF JUSTICE YOUNG: All right. Well, being humorless now we are considering I believe the proposal – the joint proposal. Is there any –

JUSTICE MARKMAN: Well, I had circulated five amendments to the proposal addressing concerns that I have I think as a result of changes in the proposal that were circulated last night. One of those amendments is no longer relevant and I only have four amendments. I'd like to make just a very brief statement, and then I'd like to ask a couple questions concerning the base proposal that we have. There's some language in there I just don't quite know what it means and I'd just like some clarification if I might. But pending any significant changes in the proposal, I respectfully oppose it because it would narrow the definition considerably of pro bono public service, and I think it would undermine the consensus that's always existed on this Court and within the legal profession generally in support of pro bono public service. And I don't think there's any reason at all why this Court should be in the least divided over the encouragement of pro bono public service within our rules of conduct. My principle concern is that the proposal adopts the premise that efforts on behalf of the indigent and poverty law organizations define the paramount purpose of pro bono services, and increasingly the exclusive purpose. And this has never before been the premise of our state's approach to pro bono services. I do not share the current proposals new hierarchical approach to pro bono services for I do not believe that it is less socially valuable to provide legal assistance to the Humane Society, the Boy Scouts, the VFW, the Lions Club, AIDS Relief for local hospices, than to sue landlords on behalf of indigent persons. I believe that pro bono service ought to be defined as inclusively as possible which is why I favor the status quo which does precisely that. With this proposal I think the Court would substitute its judgment for what concerns pro bono – meritorious pro bono services for the judgments of 35,000 diverse members of our State Bar. I might address to whoever feels they can respond some questions about the current proposal, and afterwards I'd like to raise the four amendments that I have.

First of all, to whomsoever it might concern, what is public rights law which is now one of the favored beneficiaries of pro bono work? What is public rights law? I don't quite understand it and I guess I also don't understand why it's a preferred pro bono activity. Could somebody perhaps share their thoughts with me? Perhaps the sponsors of the proposal.

JUSTICE MARILYN KELLY: I think the State Bar sponsored this proposal originally, and I notice that the Executive Director is here. Perhaps you'd like to address yourself to her.

JUSTICE MARKMAN: Has nobody adopted the proposal on this Court?

JUSTICE MARILYN KELLY: Pardon me?

JUSTICE MARKMAN: Has nobody adopted this proposal on this Court?

JUSTICE MARILYN KELLY: This proposal before us was recommended by the State Bar Board of Commissioners – or –

CHIEF JUSTICE YOUNG: I believe that's not technically correct. The Bar proposal was much more expansive. As I recall how this got to us in this forum, you and Justice Mary Beth Kelly then worked to winnow it down. But I –

JUSTICE MARY BETH KELLY: I can actually speak to that as well and I'm happy to do so. In the comments – let me – let me first say that the proposal itself which reads every lawyer should support the provision of legal services to those unable to pay. A lawyer should aspire to render at least 30 hours or 3 cases or matters of pro bono legal service per year or make a financial contribution of $300 or more to a legal services agency that provides free legal services to those unable to pay. A lawyer may also discharge this responsibility by service and activities for improving the law, the legal system, or the legal profession. The responsibilities set forth above are voluntary and shall not be enforced through the disciplinary process or other means. The comment then goes on to amplify that the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services without fee or at a substantially reduced fee and then indicates the following areas in which the provision of legal services could occur including "public rights law." And I think that your question Justice Markman which asks for the definition of what is public rights law that a lawyer could actually render that – render that pro bono service in – what is the definition of public rights law. And my understanding of what public rights law is is that if the litigant wanted to enforce through litigation or through the legal system some public right that he or she felt was being violated through litigation such a lawsuit could do that. Now the definition of public rights law as used in this comment to this rule I think is broad and it could include the right of access to a public forum or otherwise. I can't – I can't give you a complete definition, but I think it is the right that an

indigent person would have to attend a public gathering, for example.

JUSTICE MARKMAN: Why – why do you say an indigent person? There's lots of public rights that are asserted by people who are not indigent –

JUSTICE MARY BETH KELLY: But the – the whole basis here is that one is performing pro bono services. So any of these areas it is assumed that this is the provision of pro bono services.

JUSTICE MARKMAN: So do I understand it correctly that only those assertions of public rights that are on behalf of indigents would be a favored pro bono service, only those. And similarly with civil rights law. There are many civil rights – assertions of civil rights that have nothing at all to do with indigency, they have to do with dozens of other categories of areas of discrimination. Do I understand that civil rights law as a preferred pro bono activity would only be relevant as to those directed toward indigent persons?

JUSTICE MARY BETH KELLY: I think that – What I'm understanding is that the lawyer who is engaged in these areas of law would be engaged in the provision of those services without a fee, yes.

JUSTICE MARKMAN: Well, I'm confused by that too because the general provision talks only about legal services agencies that offer free legal services, and here in the comments, and this is relevant to the thing we were just discussing a few moments ago about the Rules of Professional Conduct, here the comments talk about legal services without fee –

JUSTICE MARY BETH KELLY: Or a substantially reduced fee,

JUSTICE MARKMAN: or it is a substantially reduced fee.

JUSTICE MARY BETH KELLY: Yes.

JUSTICE MARKMAN: Or is it free or is it substantially reduced? You've got to look at –

JUSTICE MARY BETH KELLY: It's either free or it's substantially reduced, and that's why it's pro bono services.

JUSTICE MARKMAN: It doesn't say free in the rule itself. I mean the comments have got to be viewed as supplemental to the

basic rule. People who want to know what their obligations are and what qualifies as pro bono services are gonna look to the rule. And the rule says only free.

JUSTICE MARY BETH KELLY: Well, in the rule, again, it says provides free legal services to those who are unable to pay.

JUSTICE MARKMAN: Period.

JUSTICE MARY BETH KELLY: Yes.

JUSTICE MARKMAN: Well, is it that or is it substantially reduced fees? Here you talk – in the comments you define legal services differently by talking about without fee or it is substantially reduced fee – or am I misreading that in some way.

JUSTICE MARY BETH KELLY: I don't think you're misreading it, I think – I think sometimes it's without fee and sometimes it's a substantially reduced fee depending on one's income.

JUSTICE MARKMAN: Well, what is –

JUSTICE MARY BETH KELLY: It's the same definition of indigency which many courts use.

JUSTICE MARKMAN: Well, you use the term here for the – that legal assistance and coping with statutes is imperative for persons of modest and limited means as well as for the relatively well-to-do. I'm just trying to figure out you know what qualifies. I'm a lawyer in Cadillac and I want to know what qualifies as a pro bono service. And I look at somebody and he looks like he's nicely dressed, he's relatively well-to-do, does some pro bono service on his behalf qualify or does it not.

JUSTICE MARILYN KELLY: I think we want to remember that this – this rule which was recommended by the State Bar of Michigan over a year ago that we've had a longtime getting this far unfortunately before us, is really directed at encouraging lawyers to perform pro bono services. It doesn't require them to do anything at all, and that – that the rule makes perfectly clear.

CHIEF JUSTICE YOUNG: I – I just want the record to be clear, I do not believe that the proposal that Justice Mary Beth Kelly read is the State Bar proposal. This is a modification of that proposal, so I think it is inaccurate to call it the State

Bar proposal. It is a choate of it, but it is not the actual proposal.

JUSTICE MARILYN KELLY: No, that isn't what I said, of course. I said that this came before us by the proposal of the State Bar.

CHIEF JUSTICE YOUNG: Oh, I misunderstood what you said. I thought you said this was the State Bar proposal. In any event, I have a concern. I think the current rule – let me read it. "A lawyer should render public service – public interest legal service, a lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to – or to public service or charitable groups or organizations. A lawyer may also discharge this responsibility by service and activities for improving the law, the legal profession – legal system or legal profession, and by financial support for organizations that provide legal services to persons of limited means." I see nothing fundamentally unsound about this. The primary difference between the current rule and the one before us that's proposed to amend it is the specificity of the number of hours that must be donated or the number of cases that must be provided on a pro bono basis and/or a specific contribution.

JUSTICE MARILYN KELLY: There's no requirement to provide any hours, remember that.

CHIEF JUSTICE YOUNG: May I finish.

JUSTICE MARILYN KELLY: I know that you want to get it straight.

CHIEF JUSTICE YOUNG: Would you let me finish?

JUSTICE MARILYN KELLY: By all means.

CHIEF JUSTICE YOUNG: Thank you. The – I concede that this is aspirational, but we are trying to send a message. And my view is that there is nothing – there is no evidence that suggests that Michigan lawyers have other than been generous with their time and their money in contributing to the charitable organizations in their communities to providing legal services. And the anecdotal evidence that I'm aware of is - is to the contrary, lawyers are providing them. I see this as – as being an unnecessary directive and I would not – I will not take that step. But much of what we have here is – exists - at least

in the commentary exists in the existing commentary to the current rule.

JUSTICE MARKMAN: May I ask some further questions please.

JUSTICE MARILYN KELLY: I'd like to make a motion if you don't mind so we can get this on. I move that we adopt this proposal as Justice Mary Beth Kelly and I have amended it.

CHIEF JUSTICE YOUNG: I pretty much assumed that it was a – that we were at that stage.

JUSTICE MARKMAN: Can I – can I ask some more questions? Tell me how does a lawyer know whether or not he is – or a firm knows that they're to provide I guess their own pro bono services in addition to the individual pro bono services at $300 a year or $500 a year?

JUSTICE MARILYN KELLY: I think it's pretty clear in here, isn't it?

JUSTICE MARKMAN: I don't see it being clear at all, that's why I'm asking the question. How do you determine who pays $300 per lawyer and who pays $500 per lawyer?

JUSTICE MARILYN KELLY: Well, nobody's – who's paying for $300 for a lawyer did you say?

CHIEF JUSTICE YOUNG: How do you determine which you're obligated aspirationally, of course, to pay?

JUSTICE MARKMAN: You use the term large law firms and successful law firms, okay.

JUSTICE MARILYN KELLY: Right.

JUSTICE MARKMAN: I look at my own law firm, I think it's successful, but I'm not quite sure.

JUSTICE MARILYN KELLY: Well, then you should consider $500 if you consider yourself successful.

JUSTICE MARKMAN: Pardon me? Are we gonna give any guidance to anyone of the 35,000 lawyers as to what their obligations are?

JUSTICE MARILYN KELLY: There are no obligations here, you have to remember that. This is aspirational. This is a recommendation for the good of the profession and the people. It's hard to oppose that it seems to me.

JUSTICE MARKMAN: Do you agree with Justice Mary Beth Kelly that in setting forth this litany of qualifying activities – poverty law, civil rights law, public rights law, that's limited by those individuals who are – that's limited to services on behalf of individual indigent persons within those realms.

JUSTICE MARILYN KELLY: It – the comment says specifically while it's preferable that pro bono legal services be rendered to the impoverished, they're also appropriately rendered to charitable organizations and to activities that improve the law, the legal system, and the legal profession.

JUSTICE MARKMAN: I can read it, but I think I'm asking a fairly straightforward question. You've got two civil rights litigants, one who's indigent, the other of whom is arguing that he's the victim of obesity discrimination and he's – and he's not indigent. Does your pro bono aspiration – is that satisfied by either of those representations or not?

CHIEF JUSTICE YOUNG: You're paid for the other one.

JUSTICE MARKMAN: No, they're both – they're both things I'm considering doing on a charitable basis.

JUSTICE MARILYN KELLY: Well, then they're both pro bono work, aren't they?

JUSTICE MARKMAN: So indigency is not – is no longer the focus even though the first paragraph seems to emphasize indigency.

JUSTICE MARILYN KELLY: Indigency is the focus and that's because we have a great deal of indigency in this state and a great many people who can't afford to use the courts. But we're not saying that the only thing that qualifies as pro bono work is work done for the indigent.

JUSTICE MARY BETH KELLY: Well, I think as well if you look at the comment it makes it clear that charitable organizations need not be impoverished whereas in the first paragraph of the comment it suggests that the poverty law, civil rights law, public rights law, that part of the comment suggests without fee

or substantially reduced fee and charitable organization is included there. The qualifying caveat in the second part of the comment suggests that it's preferable that pro bono legal services rendered to the impoverished.

CHIEF JUSTICE YOUNG: Well, I mean wouldn't you say that the big – the commentary remains largely unchanged.

JUSTICE MARY BETH KELLY: Correct.

CHIEF JUSTICE YOUNG: The biggest change is we are now aspirationally directing lawyers in the state how much money they give if they don't do a specific amount of pro bono service. My primary objection to this is that this is a large law firm, silk-stocking elite lawyer direction. We are in the heart of a near depression in this state, I believe lawyers in the state are generous with their time, with their money, I think that's sufficient.

JUSTICE MARKMAN: I'm not sure that's right that the commentary is not largely changed. I mean there's substantial changes in the commentary not the least of which is that 6.1 currently addresses public service or charitable groups or organizations and it's quite pregnant that public service has been taken out.

CHIEF JUSTICE YOUNG: That's true.

JUSTICE MARKMAN: I guess I'm just – I'd like to ask what is that – what is the significance of that? Why is that – why was there an effort made to take out public service organizations – Rotarians, the Kiwanis Clubs, the Elks, the Lions, the Optimist – do those no longer qualify as pro bono organizations – the Boy Scouts, the Girl Scouts, the 4-H Club, groups that have done enormous things to enhance the level of community and society in small and large towns around the country. Why – what was the motivation for taking that out?

JUSTICE MARILYN KELLY: I think you're misreading this rule Justice Markman.

JUSTICE MARKMAN: Well, please give me guidance.

JUSTICE MARILYN KELLY: There's no effort to take away anybody or any group. We're simply directing the attention of the lawyers in the state to the great need there is to furnish legal services to the impoverished.

CHIEF JUSTICE YOUNG: Is there any objection to putting it back in as it is in the current rule that - the public service?

JUSTICE ZAHRA: Into the comment section.

CHIEF JUSTICE YOUNG: No, into – it's in the rule now.

JUSTICE ZAHRA: Into the rule itself.

CHIEF JUSTICE YOUNG: I mean I think for the most part that the commentary is pretty much similar, but I think Justice Markman has raised another significant difference between the current rule and the proposed rule which is the elimination of public service as an appropriate object of pro bono activity. And I'm not sure I understand – I understand generally you're not trying to exclude things, but I think, frankly, the original Bar proposal that we rejected really was directional. It only allowed activities directed at specifically authorized groups, at least identified as such, and I'm concerned about that. Currently, people can make – lawyers can make contributions to their communities in lots of significant ways.

JUSTICE MARY BETH KELLY: And I think that a lot of the focus of our proposal was to remind lawyers of the real significance that the actual provision of legal services as opposed to the more charitable contributions has on the legal system in general, and to refocus if you will the pro bono efforts at those legal services themselves.

CHIEF JUSTICE YOUNG: But, again, there's a presumption that one is better than the other. The idea that serving on a charitable board that in turn serves needy citizens and providing legal services to help those organizations provide those services to me is not ineluctably inferior to giving fees to a legal service. They are both worthy and I don't – that's what I'm concerned about with this – this innovation – this amendment. It seems to be putting a thumb on the scale and saying these are more worthy activities than other activities currently recognized in the rule, both are aspirational. So we're not talking about somehow that we are changing now to make aspirational that which was mandatory but we are sending signals. And I'm concerned about the signals we're sending that somehow public service or charitable organizations are less valuable objects of pro bono activity than others. And I merely asked those who are the proponents of this why would you

eliminate public service and are you amenable to putting it back in as it is in the current rule.

JUSTICE CAVANAGH: You could put it in after the second sentence of the proposal submitted by Justices Kelly where it says or more to a legal service agency that provides free legal service to those unable to pay or - taking the current language of the current rule - or to –

CHIEF JUSTICE YOUNG: Public service.

JUSTICE CAVANAGH: to public service or charitable groups or organizations.

JUSTICE MARKMAN: That would be in the body Justice Cavanagh?

CHIEF JUSTICE YOUNG: Yes.

JUSTICE CAVANAGH: Yeah.

JUSTICE ZAHRA: Would you not need it in two places following - essentially those same words following the terms unable to pay at the end of the first sentence as well as following the second sentence?

CHIEF JUSTICE YOUNG: Why?

JUSTICE MARY BETH KELLY: No.

CHIEF JUSTICE YOUNG: I don't think so.

JUSTICE ZAHRA: Every lawyer should support the provision of legal services to those unable to pay or to public service or charitable groups or organizations.

CHIEF JUSTICE YOUNG: In fact, you could put it there or the other – perhaps it's better to put it earlier that way you don't have to repeat it. How about that?

JUSTICE CAVANAGH: That's fine.

CHIEF JUSTICE YOUNG: Okay. I feel better about that.

JUSTICE MARKMAN: And can you summarize please what was just done.

CHIEF JUSTICE YOUNG: Yeah. The first sentence would say every lawyer should support the provision of legal services to those who are unable to pay or to public service or charitable groups or organizations.

JUSTICE MARKMAN: Wouldn't you put in the same language later on where it says a lawyer should aspire to render at least 30 hours or 3 cases or matters of pro bono legal services per year – well –

CHIEF JUSTICE YOUNG: The problem is –

JUSTICE MARKMAN: Has this new proposal been changed in ways other than eliminating the –

CHIEF JUSTICE YOUNG: Well, the problem is they make an equivalency for the provision of direct legal services by litigation, that's what 30 hours or 3 cases is there and then the financial equivalency is $300. So the problem is when you're giving pro bono services to a charitable organization you're not litigating, there is no comparable measure unless you I guess – I guess you could give 30 hours of service maybe that's the best thing you could do.

JUSTICE ZAHRA: The problem is that it's a rule that's not a rule at all it's a suggestion.

CHIEF JUSTICE YOUNG: It's an aspiration. But if we're giving – if we're sending signals, I want to send at least the right signals.

JUSTICE ZAHRA: And I agree. And if we make that addition to public service, charitable groups or organizations up front in an aspirational rule I think that the message is clear that these organizations apply throughout the rule.

JUSTICE MARKMAN: Well, but shouldn't the same language go after to pay at the end of the second sentence?

CHIEF JUSTICE YOUNG: Well, that was what Justice Zahra suggested, but I'm not sure is it – do you think that's required, a repetition.

JUSTICE MARKMAN: Well, I think it's talking about a slightly different concept in the second sentence. The first sentence is talking about the direct provision of legal services. The second one, as best as I can fathom, it seems to

be talking about doing so indirectly or through an intermediary organization.

CHIEF JUSTICE YOUNG: Okay, I see the point. So it would be or to – see it doesn't quite work. Making contribution to public service – a public service, charitable – I don't know – it doesn't – there is a parallel problem here because we're talking in that sense about making a contribution to –

JUSTICE MARKMAN: Perhaps Ms. Boomer could –

MS. BOOMER: Well, it would provide a public service.

CHIEF JUSTICE YOUNG: Well, that's –

MS. BOOMER: (off microphone)

CHIEF JUSTICE YOUNG: That's the office of the first one – that's the office of the first sentence. The second sentence says okay, if you're – if you can give 30 hours – have we got a solution here.

JUSTICE CAVANAGH: Well, it just seems to me his – her suggestion, paragraph one of his May 2nd memo, every lawyer should support the provision of legal services to those unable to pay or to public service or charitable groups or organizations.

CHIEF JUSTICE YOUNG: That is exactly – I mean I –

JUSTICE CAVANAGH: Then at the end he adds that or to public service or charitable groups.

JUSTICE MARY BETH KELLY: I don't think it's needed twice, I think it should just go at the end of the first sentence and leave it at that.

CHIEF JUSTICE YOUNG: Whatever. Okay. This is the perils of drafting in public -

JUSTICE MARKMAN: Can I ask another question?

CHIEF JUSTICE YOUNG: and by committee.

JUSTICE MARKMAN: Do I understand that somebody who participates say in a service club and provides legal services and gives time and effort to a service club would not be

relieved of his obligation to – Well, I guess I'm trying to understand the meaning of what it says in the second paragraph of the comments. "Although the minimum financial support to organizations providing free legal services to persons of limited means in lieu of providing pro bono services is $300 per lawyer per year." Now what does that mean? That means that if you don't provide pro bono services of any sort, but if you give a check that's okay. That qualifies for your pro bono aspiration.

JUSTICE MARY BETH KELLY: Right, that's what the present rule is.

JUSTICE MARKMAN: So giving a check is okay so long as it's to an approved organization, but actually volunteering on behalf of say a service club or a hospital or a hospice or something like that of your time doesn't satisfy your obligation.

JUSTICE MARY BETH KELLY: We know that there are lawyers who volunteer on behalf of hospitals and service organizations because lawyers are good people and they do that. The import of what we were trying to capture with this amendment was to have lawyers give legal services – to do pro bono legal work - and that's what we were really trying to capture. It's – there's no doubt that lawyers are good human beings and that they give of their time every day and we know that. But we were really trying to get lawyers to focus on legal services, not just – in part because in our state there are a lot of persons who are indigent who need the services of lawyers. So that's what this amendment was really trying to focus on, and it wasn't – it wasn't to say that one kind of pro bono service is better than another, it was in part that there's a crisis as to those who need legal services and can't get them. So that was in part what this amendment was trying to address as well. We weren't trying to tip the scale so to speak, it was trying to say we need lawyers to give of their time to those who can't afford legal services.

JUSTICE MARKMAN: I'd understand your argument a lot better if I understood clearly why public rights law and civil rights law are in there without any limitation upon the monies going to indigent persons.

JUSTICE MARY BETH KELLY: Because – I disagree that they are in there without a limitation on – without that limitation. The first paragraph limits civil rights law, public rights law, and poverty law to those persons without fee or at a

substantially reduced fee. That's how I think that comment is limited.

JUSTICE MARKMAN: And what's wrong with my third amendment then which would look at that language and add other areas – private rights law, constitutional law, health care compliance, tax compliance, regulatory compliance law, small business law, veterans benefits law, integrity of elections law – what's wrong with adding those categories then if that's – We're talking about legal services here.

JUSTICE MARY BETH KELLY: Yeah, why don't we just say or other matters.

JUSTICE MARKMAN: That would be a much better approach.

JUSTICE MARY BETH KELLY: Or other matters.

JUSTICE MARKMAN: Well, why are we highlighting some matters that have nothing directly to do with poverty and other matters are not being mentioned?

JUSTICE HATHAWAY: I agree with Justice Markman and I specifically like his proposal 1 of his May 2nd memo – every lawyer should support the provision of legal services to those unable to pay or to public service or charitable groups or organizations. A lawyer should aspire to render at least 30 hours or 3 cases or matters of pro bono legal services per year or make a financial contribution of $300 or more – and then I think we shouldn't put the rest of that but just say to such provision choice which encompasses what you just said in the above sentence, or something along those lines.

JUSTICE MARKMAN: I accept that as a friendly –

CHIEF JUSTICE YOUNG: To such organizations – persons or organizations.

JUSTICE HATHAWAY: Yeah, something like that without specifically naming them again.

CHIEF JUSTICE YOUNG: To such persons or organizations.

JUSTICE HATHAWAY: Yeah, that would do it.

JUSTICE MARKMAN: But in the comments I just don't understand the point of really skewing this process so that some

categories of law qualify and others that I think are equally good – I mean I agree with you Justice Kelly that we're focusing upon legal services, but I don't think I'm – my amendment would detract from that. I'm talking about legal services.

JUSTICE MARY BETH KELLY: I agree with you, and I don't disagree that your identification in your comment three are other types of rights that those persons who don't have the ability to pay for should be able to pursue. My concern is that we don't – we don't want to miss an area of the law so we should perhaps have a catch-all private rights law, eminent domain law, constitutional law, health care compliance law, tax compliance law, regulatory compliance law, small business law, veterans benefits law, integrity of elections law.

CHIEF JUSTICE YOUNG: Why – why are we trying to categorize, that's the – I think that's the essential challenge that Justice Markman is raising.

JUSTICE MARY BETH KELLY: We do say in one or more –

CHIEF JUSTICE YOUNG: That's the problem, once you start saying one or more you get in the Slough of Despond to say okay these are favored but we don't mean to exclude anything else. Can't we simply eliminate the – Then let's leave my favorite ones in and eliminate everybody elses. I mean that's – that's –

JUSTICE HATHAWAY: Why don't we just eliminate that whole first part of the comments but keep this rule expresses – this rule is not intended to be enforced through the disciplinary process.

CHIEF JUSTICE YOUNG: I would – I think that would be a perfect commentary. This is an aspirational rule –

JUSTICE HATHAWAY: Right.

CHIEF JUSTICE YOUNG: it is not intended to be enforced through the disciplinary process. That's the only commentary I think we need.

JUSTICE HATHAWAY: Right.

CHIEF JUSTICE YOUNG: If the – if we make the suggested change that we just made to Justice Markman's first proposal which I think carries us through and eliminate the comment

except to say this is an aspirational rule – it's in here somewhere isn't it.

JUSTICE ZAHRA: It's in the current comment's last sentence.

CHIEF JUSTICE YOUNG: Last sentence.

JUSTICE ZAHRA: The last sentence in the first paragraph of the current comment.

JUSTICE CAVANAGH: Or in that first paragraph of the comment you simply cut-out those specific areas mentioned and just say in one or more – many – of many areas.

CHIEF JUSTICE YOUNG: I don't even need to – my view is we don't have to reference the ABA House of Delegates or anything else. I think that what we need to say is this – wherever – I can't find the actual disclaimer – oh, this rule expresses a policy of lawyer pro bono work, but is not intended to be enforced through a disciplinary process.

JUSTICE ZAHRA: Would it not be just simply this rule is not intended to be enforced through disciplinary process.

CHIEF JUSTICE YOUNG: That would be – that works for me.

JUSTICE ZAHRA: That would be the only comment that would be necessary.

CHIEF JUSTICE YOUNG: That's fine by me.

JUSTICE MARKMAN: Can I raise just one other area? I'm gonna recede on my last amendments which I think goes beyond what Justice Mary Beth Kelly is defining as the purpose of this. But I would like to – so I'll recede on that one. But on number 2, I think the amendment I have at number 2, we're talking about legal services but we're now limiting it to things that improve the law, the legal system, or the legal profession. The question I have is one of policy. I add "or by service and activities for improving schools, churches, neighborhoods or communities, or assisting children, the elderly, veterans, the handicapped, the mentally impaired, the blind, the deaf, or victims of crime, natural disasters, or diseases. I mean if that were clarified to focus upon legal objectives, which I think is the purpose of this first sentence if I understand it correctly, would there be any objection to that?

CHIEF JUSTICE YOUNG: Yeah, I have the same objection when you start naming privileged – and privileged by being named – organizations. I – I mean I could make a list.

JUSTICE MARKMAN: Well, I agree with you, but if you're going to name some of them –

CHIEF JUSTICE YOUNG: Well, I would avoid – I would like to avoid the naming –

JUSTICE MARKMAN: Okay.

CHIEF JUSTICE YOUNG: because I think we should let our lawyers make those determinations to the extent that we can do so. You want to speak – you seem to want to speak. Come forward. This is the State Bar.

MS. WELCH: Thank you very much.

JUSTICE CAVANAGH: Did the Representative Assembly have this much trouble?

MS. WELCH: The Representative Assembly did spend a good deal of time on this, and I have to confess –

CHIEF JUSTICE YOUNG: Give your appearance, I'm sorry.

MS. WELCH: Janet Welch, Executive Director, State Bar of Michigan. I have to confess that I was having some trouble following exactly what it was you were amending and what it was you were proposing. The State Bar had a proposal and you published a proposal and we expressed a preference for one of the alternatives that you published, and beyond that I'm not sure. But the impetus for the Bar's recommendation to the Representative Assembly was a pro bono survey that we did with members that indicated that there was confusion about the rule—what it meant—what the message was. And our proposal was intended to clarify that. And, indeed, it was intended to express a preference for helping people who could not afford access to justice. And for helping the impoverished and that is – I'm not sure where that preference is in the current discussion, but I –

CHIEF JUSTICE YOUNG: I think that's a policy debate we're having right now whether it's narrowly – whether the provision of lawyer pro bono services should be directed only at the

direct legal provisional services or whether a lawyer can by other service—where they are providing legal advice to an organization that has a broad mission to help the public—whether that's acceptable pro bono service. And I think this proposal leans on the other side, no? This – it has to be direct legal service. It can't be that you're providing continuous legal advice that helps an organization in a more charitable – general charitable side of the equation.

MS. WELCH: And the Bar's preference in that regard I think has been clearly expressed, and then I think it's consistent with the model rules and national historical policy in terms of pro bono. The second –

CHIEF JUSTICE YOUNG: But that isn't what the current rule actually expresses. This is a –

MS. WELCH: Agreed.

CHIEF JUSTICE YOUNG: This would be a narrowing of what would be deemed in - aspirationally speaking - acceptable pro bono service, isn't that right?

MS. WELCH: I think that's what you're doing here, but not having the language in front of me I'm not sure what's happening.

CHIEF JUSTICE YOUNG: I appreciate that.

MS. WELCH: Which brings me to my second point which is that we did want there to be more clarity or more clear guidance in the rule which is, as we have all acknowledged over and over again, aspirational. And so I would ask that to whatever extent you come up with yet another version today that you would publish that for comment also because it may be that we would consider the status quo clearer than what you come up with.

CHIEF JUSTICE YOUNG: Yeah, thank you, it's a point well taken.

MS. WELCH: Right.

CHIEF JUSTICE YOUNG: Thank you.

MS. WELCH: Thank you.

JUSTICE CAVANAGH: The Court should be aware that yesterday Ms. Welch received Lawyers Weekly's Outstanding Woman Lawyer of the Year.

CHIEF JUSTICE YOUNG: Yes, I read that, congratulations. Well, where do we want to go?

JUSTICE HATHAWAY: Well, I do agree with Ms. Welch that we – whatever we decide should be republished for – or published for comment.

CHIEF JUSTICE YOUNG: Okay. Is there any objection to that? If there isn't, can we - can we go back inside and start drafting – not in committee. I would like the two sponsors of what we have before us to at least take another crack at it and then maybe we can agree on something for publication. Is that –

JUSTICE MARY BETH KELLY: What I sponsored I'm not hearing as being sponsored any more so –

CHIEF JUSTICE YOUNG: Well, let me ask you to take the laboring or in attempting to condense into a draft for our review what you think you heard.

JUSTICE MARY BETH KELLY: What if I didn't like the (inaudible) amendments?

CHIEF JUSTICE YOUNG: You can – you can express that.

JUSTICE MARY BETH KELLY: Okay, I'm happy to redraft the amendment and circulate it.

CHIEF JUSTICE YOUNG: Okay.

JUSTICE MARY BETH KELLY: With Justice Cavanagh's –

CHIEF JUSTICE YOUNG: Well, he actually picked up Markman's –

JUSTICE MARY BETH KELLY: Justice Markman's number 1?

CHIEF JUSTICE YOUNG: We can – I'll try and share my notes with – to the extent that they're anymore accurate than anybody elses.

JUSTICE MARY BETH KELLY: Okay.

CHIEF JUSTICE YOUNG: But I think it would be helpful to us now to have another draft to look at.

JUSTICE MARY BETH KELLY: I agree. Okay.

JUSTICE MARKMAN: Can I just say Chief Justice I'm not entirely comfortable as we – as we proceeded through this you know raising very specific questions about the language, and I agree with you and others that this seems to be more the kind of thing that ought to be done you know when we can roll up our sleeves and get – get some drafts in front of us and start looking at the provisions individually. But – but I have to say this is the – this is the process that substitutes for that, and if we don't do it here there's no other process where this can be done.

CHIEF JUSTICE YOUNG: I'm not suggesting – I think there's a substantial policy issue here, and it's the one that Ms. Welch and I were discussing. And you can – it's not on principle to come down on either side of it, but it is a policy question and I don't have any problem with – and we should perhaps debate it more in public—but I think we want to have, again, another concrete proposal before us in order to have that debate. And I would encourage you, Justice Markman, once we get it to, again, as you have in the past provide your – your own assessment. Thank you ladies and gentlemen for participating in our administrative hearing – public administrative hearing, we're adjourned.